

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Franklin W. Olin College of Engineering

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D.T.E. 01-95

INITIAL BRIEF
OF
BOSTON EDISON COMPANY

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. BACKGROUND	2
III. PROCEDURAL HISTORY	3
IV. SUMMARY OF THE ARGUMENT.....	5
V. STANDARD OF REVIEW	13
VI. ARGUMENT.....	15
A. Needham Is Within Boston Edison's Service Territory Pursuant to G.L. c. 164, § 1B(a).....	15
1. Boston Edison Has Historically Provided Distribution Service to Needham, and Therefore, Boston Edison Has the Exclusive Right to Serve Customers Located In Needham.....	15
2. Boston Edison Currently Provides Exclusive Distribution Service Throughout Needham.....	16
B. Olin College Is Located Exclusively in the Town of Needham.....	18
C. Boston Edison Is Ready, Willing and Able to Provide Olin With Reliable and Cost- Effective Service.	19
1. Boston Edison Can Serve Olin Reliably and at Reasonable Cost in Accordance with Its Department-Approved Tariffs.	19
2. Boston Edison Is the Only Distribution Company Authorized to Serve Olin's Campus.....	23
D. None of the Prior Instances of WMLP's Provision of Service to Border Customers in Needham Is Relevant to Olin Because of Vast Differences in Each of the Scenarios.	28
1. Cartwright Road Area	29
2. Design Housing/Grove Street	31
3. MWRA Monitoring Station	32
E. This Is Not an Instance Where the Service Territory Should Vary From Municipal Boundaries Because Olin Engaged in Creative Conveyancing to Circumvent Chapter 164.	34
1. Olin Has Engaged in Several Forms of Creative Conveyancing to Support Its Petition to Receive Distribution Service From WMLP.	35
2. Olin Has Failed to Demonstrate That It Is Not Possible for the Department to Follow Municipal Boundaries in Deciding This Case or That Olin's Receipt of Service From WMLP Would Not Thwart the Legislative Intent of G.L. c. 164, § 1B(a).....	38
F. The Provision of Temporary Service to Olin Is Illegal.	40
G. Olin's and WMLP's Allegations Regarding Reliability and Cost Are Not Relevant to the Determination of Exclusive Service Territory Boundaries	43
VII. CONCLUSION	47
APPENDIX A	

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I. INTRODUCTION

This is ultimately a simple case involving a customer, Franklin W. Olin College of Engineering (“Olin”), located in the Town of Needham (“Needham”), Massachusetts, which is part of the exclusive service territory of Boston Edison Company, d/b/a NSTAR Electric (“Boston Edison” or the “Company”). Olin’s campus is located near the municipal boundary with the Town of Wellesley (“Wellesley”), Massachusetts, and Olin seeks to receive electric service from Wellesley’s provider, the Wellesley Municipal Light Plant (“WMLP”).

This case is a simple one because the outcome rests on two facts: (1) Olin is located in Needham; and (2) Boston Edison serves Needham. The plain language of the relevant statute, as interpreted through precedent of the Department of Telecommunications and Energy (the “Department”), is quite clear in establishing a system of exclusive electric distribution system franchises following, to the extent possible, municipal boundaries. G.L. c.164, § 1B(a); Massachusetts Electric Company, D.T.E. 98-122 (2002) (hereinafter referred to as “Mass. Elec.”). Both Olin and WMLP have sought to obscure this issue with a host of tangential and irrelevant considerations and arguments that, the Company submits, the Department should recognize as attempts to confuse what is a simple matter. Because Olin is located in Needham, which is within Boston Edison’s franchised service territory, Olin’s Petition seeking to receive service from WMLP should be denied by the Department. Boston Edison seeks to protect the

integrity and exclusivity of its service territory, and is ready, willing, and able to provide Olin with distribution service at a reasonable cost and at a high level of reliability, in accordance with its rates, terms and conditions, as approved by the Department. Accordingly, Boston Edison respectfully requests that the Department order Olin to receive service from Boston Edison, the distribution company of record providing service to customers located in Needham.

II. BACKGROUND

Olin is a small engineering college in Needham founded in 1997 that currently has about 30 students, and expects to have a total enrollment of approximately 650 students when fully operational (Tr. 1, at 18, 23). The 70-acre Olin campus is located directly adjacent to Babson College ("Babson"), abutting the municipal boundary between Needham and Wellesley (Exhs. IR-BE-1-1A Att.; IR-BE-1-1B Att.; IR-BE-1-1C Att.). Babson is located primarily in Wellesley, although a small portion of its contiguous campus is located over the town line in Needham (Exhs. IR-BE-1-1A Att.; IR-BE-1-1B Att.; IR-BE-1-1C Att.). Electricity users in Wellesley receive their electric service from WMLP and, accordingly, Babson's main campus, including the portions of its campus that straddle the town boundary, are served by Babson's internal distribution network, which receives its supply from WMLP (Exh. BE-ARJ-4). Since January 2000, Olin has been receiving, and to this date continues to receive, the temporary service for its new buildings through facilities owned, operated and maintained by Babson, and from electricity supplied by WMLP (Exh. OC-2, at 16; Tr. 1, at 63). Olin seeks to receive its permanent distribution service through a direct connection with WMLP on the Babson campus in Wellesley (Tr. 1, at 38). Olin's current load is approximately 1 megawatt ("MW"), and expects its total load, upon full build out in eight to ten years, to be approximately 4 MW (Tr. 5, at 814-815; Tr. 4, at 609-610; Tr. 1, at 22-23).

Needham is within the exclusive service territory of Boston Edison, as defined by Chapter 164 of the Acts of 1997, An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein (the “Act” or the “Restructuring Act”). See St. 1997, c. 164, § 193, inserting G.L. c. 164, § 1B(a). Boston Edison has served Needham in general for approximately a century (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 15-16) and currently serves the area of Needham immediately adjacent to and surrounding the Olin campus, including various buildings and properties on land owned by Babson (Exhs. IR-OC-1-19(A) Supp. Att.; IR-OC-1-19(B) Supp. Att.; BE-ARJ-4; BE-JJN-1, at 20-21). Moreover, Boston Edison currently provides electric service to at least five pre-existing buildings on the Olin campus in Needham, and provided such service for several decades prior to Olin’s acquisition of the property (Exh. OC-2, at 5). Except for a vacant 1,000 square-foot swatch of land in Wellesley, purchased by Olin ten days before filing its Petition in this case, Olin is located entirely in Needham, and all of its electricity consumption occurs in Needham (Exhs. IR-BE-1-4 Att.; IR-BE-1-20; IR-BE-1-21).

III. PROCEDURAL HISTORY

Olin filed its Petition on November 9, 2001, seeking a declaratory ruling or, alternatively, approval pursuant to G.L. c. 164, § 47A(d), that it may obtain its distribution service from WMLP. Boston Edison filed a Petition to Intervene in this case on November 28, 2001, and WMLP filed its Petition to Intervene on November 29, 2001. These petitions were granted by the Department on the record during the procedural conference held on January 23, 2002 (Tr. Public Hearing, at 5 (Jan. 23, 2002)). At the procedural conference, a procedural schedule was set allowing for a period of discovery and contemplating two days of evidentiary hearings, scheduled for March 28 and 29, with briefs due shortly thereafter (id. at 14-15).

On January 31, 2002, Boston Edison filed a Motion for an Expedited Order to Maintain Status Quo Ante (the “Motion”) pending the Department’s resolution of this matter seeking to cease the illegal provision of temporary distribution service to Olin. On February 7, 2002, both Olin and WMLP filed Oppositions to Boston Edison’s Motion (the “Oppositions”). On February 12, 2002, based on information uncovered during the proceedings, Boston Edison moved to join Babson as a party to this proceeding, based on Babson’s provision of distribution service to Olin. On that date, Boston Edison also filed its Reply to Olin’s and WMLP’s Oppositions to the Motion. Babson requested leave for a limited appearance as a non-party in these proceedings on February 19, 2002. This request was not opposed and, accordingly, Babson filed its opposition to being joined as a party on February 20, 2002. Both Olin and WMLP filed separate responses to Boston Edison’s reply and its Motion to Join Babson on February 20, 2002. Oral argument on Boston Edison’s Motion was held on February 25, 2002, and a ruling is pending. Throughout this time period, the parties engaged in extensive discovery, responding, in total, to hundreds of information requests in preparation for evidentiary hearings.

Evidentiary hearings in this matter began on March 28, 2002. By agreement of the parties and consent of the Hearing Officer, on the morning of March 28, 2002, all of the parties and the Hearing Officer participated in a site tour of the Babson and Olin campuses, led by Stephen Hannabury, Vice President for Administration and Finance for Olin. The site tour consisted of a viewing of the geographical area of the Olin and Babson campuses, including the new and existing buildings on the Olin campus, the relevant electrical equipment on the Babson and Olin campuses and the 1,000 square feet of property owned by Olin in Wellesley. Also visited were a Massachusetts Water Resources Authority (“MWRA”) monitoring site on the

Needham-Wellesley town line and Boston Edison's Station 148. Evidentiary hearings began at the Department's offices at One South Station at 1:00 p.m. that afternoon.

Overall, the hearings took six days and involved five witnesses. Olin presented the testimony of Mr. Hannabury. WMLP presented Richard Joyce, Director of WMLP, and Donald Newell, Electric Superintendent of WMLP. Boston Edison presented Jeffrey Niro, Boston Edison's Account Executive to Olin for much of the time period in question, and Amin Jessa, P.E., a Lead Engineer at Boston Edison responsible for engineering and distribution services to this geographic area of the Company's service territory. Hearings were concluded on April 22, 2002. In total, the evidentiary record contains approximately 316 exhibits, consisting primarily of the parties' responses to information requests and the parties' pre-filed testimony. The Hearing Officer set the filing date for initial briefs, proposed findings of fact and conclusions of law for May 6,¹ with reply briefs due May 13.

IV. SUMMARY OF THE ARGUMENT

In this proceeding, Olin, a current Boston Edison customer located in Needham, has petitioned the Department for approval to be served by WMLP, which is the electricity provider in the adjacent municipality of Wellesley. Broadly viewed, Olin's Petition raises fundamental issues relative to the rights of electric distribution companies in the Commonwealth to serve customers located in their service territories. In the restructured electric utility industry, and pursuant to the Act, the role of distribution companies has been narrowed considerably and defined explicitly. Although before March 1, 1998, electric companies operated as monopolies for the full range of electricity services to their customers, the Act establishes a uniform and

¹ As directed by the Hearing Officer, Boston Edison has appended to its brief, in Appendix A, its Proposed Findings of Fact and Conclusions of Law.

exclusive right for distribution companies to deliver electricity, at rates and terms and conditions subject to the authority of the Department. In so doing, the Legislature prescribed that distribution companies such as Boston Edison were to be granted explicit and exclusive franchise rights to serve customers located in their service territories, as those territories existed on July 1, 1997. See G.L. c. 164, § 1B(a). Without clear and appropriate enforcement of those exclusive franchise rights by the Department, the legislative policy adopted in the Act would be in substantial jeopardy.

This is not an abstract or theoretical notion either. Absent an exclusive franchise right to serve customers, distribution companies would have no assurance of what customers they are entitled to serve, their exclusive rights to use public ways to serve such customers, or the recovery of stranded costs, energy-efficiency costs, and the cost of renewables through non-bypassable charges from all customers in their service territory,² each as set forth by the Legislature. In such a setting, the “cherrypicking” of large customers by neighboring distribution companies could also become commonplace. From the perspective of customers, a similar level of chaos would persist. Incentives for customers to initiate border wars through the creative acquisition of property rights in order to bypass stranded cost, energy efficiency and renewable charges, or simply to seek out the supplier with the lowest Department-approved rates, would likewise exist. These outcomes would significantly undermine regulatory certainty and be contrary to overall fairness, as well as compromise the financial integrity of distribution companies, all of which would be detrimental to customer interests. In the long run, the prospect of higher costs to customers at lower levels of service reliability would be inevitable. In

² In particular, with regard to stranded cost recovery, allowing customers to avoid paying their respective share of the distribution company’s uniform transition charges would impose larger stranded-cost obligations on other customers and would be highly inequitable.

addition, the likelihood of the regulatory floodgates opening, and the morass that would be created thereby, should not be underestimated.

Although a voluminous record has been assembled during the course of this proceeding, the applicable law and pertinent facts for the Department to evaluate in the course of its deliberations are simple and few. With respect to the law, the Act provides Boston Edison an exclusive franchise right to provide distribution service to all retail customers located in its service territory, based on the service territory actually served by Boston Edison on July 1, 1997, and following municipal boundaries “to the extent possible.” G.L. c. 164, § 1B(a); see Mass. Elec., D.T.E. 98-122, at 6 (2002). And, with respect to the facts, it is clear that Boston Edison has served and continues to serve customers located in Needham and that Olin is located in Needham. To that end, it is uncontroverted that all of Olin’s current buildings are located in Needham, that all of Olin’s electricity load from those buildings is in Needham, and that, except for a miniscule patch of land (discussed below), all of the land Olin owns in fee is located in Needham. Further, it is undisputed that Olin’s mailing address is in Needham, that Olin’s water and sewer services are from Needham and that Olin takes gas service from NSTAR Gas Company, the franchised local gas distribution company serving Needham. In short, Olin has no factual characteristics that would warrant a determination by the Department that Olin is located in Wellesley, or that electric service to the campus should be from a source other than the Company, as the franchised distribution company serving Needham. Based on all of these considerations, Boston Edison respectfully submits that the Department should rule that Olin is a customer located in Needham, properly served by Boston Edison (see Sections VI.A and VI.B, infra).

Olin's and WMLP's arguments to the contrary have evolved throughout the proceeding, but are nonetheless unavailing. First, Olin presented the view that it owned land in Wellesley on which it would try to accept service from WMLP. As the facts in the case were subjected to scrutiny, it was revealed that this land represented a tiny 1,000 square-foot piece of vacant land in Wellesley, that the land was not a buildable lot, that the land was purchased separately from the remaining 3.2 million square feet on the Olin campus, that the purchase was within 10 days of Olin filing its Petition in the case, and that the only purpose of acquiring this piece of land was so that Olin could argue a "presence" in Wellesley from which it could secure service from WMLP. Given the Department's recent ruling in Massachusetts Electric Company, D.T.E. 98-122, particularly regarding the prohibition on "creative conveyancing" for advancing claims on service rights (*id.* at 11), Boston Edison submits that the purpose of Olin's 1,000 square-foot speck of land to circumvent the Company's franchise rights is both transparent and ineffective; moreover, based on Olin's more recent explanations in the case, it is apparent that even Olin now concedes this point (*see* Sections VI.A and VI.E.1, *infra*).

Next, Olin has tried to emphasize the close working relationship it has developed with Babson, and Babson's previous service from WMLP as a "straddling" customer in Wellesley and, to a small extent, in Needham, as support for its request to be served by WMLP. Although Boston Edison does not question that Olin and Babson intend to maintain a close relationship and to achieve efficiencies because of their proximity, this is not relevant to the essential legal and regulatory issue of where Olin is geographically located and which utility has the statutory right of providing electric service there. It is indisputable that Olin is a separate legal institution from Babson, that Olin's land ownership has been deeded by Babson to Olin and is thus separate from land owned by Babson, that Olin is not a straddling customer and that Olin's "presence" is

exclusively in Needham. Moreover, there is nothing about a cooperative relationship between two parties that necessitates that their electric distribution service comes from the same source. Accordingly, notwithstanding the extent or sincerity of Olin's working relationship with Babson, Boston Edison maintains that these claims are simply not a material factor for the Department to consider in determining the Company's right to serve Olin (see Sections VI.C and VI.E, infra).

Further, unlike Babson, there is no historical instance of service by WMLP to Olin that might warrant an exception from the dictates of G.L. c. 164, § 1B(a).³ In this regard, Olin's and WMLP's argument rests on a group of light poles on land formerly owned by Babson in Needham, formerly served through Babson's internal distribution network in Wellesley. The fact is that these light poles represented a very small level of electricity consumption and have since been removed now that the land is owned by Olin. Moreover, the prior supply to Babson for these light poles was taken in Wellesley at the point of connection with Babson's distribution system and was part and parcel of Babson's existence as a customer straddling both Wellesley and Needham. Neither of these critical elements is present any longer, given the removal of the light poles, and the fact that Olin is separate from Babson and is not itself legitimately a straddling customer. Therefore, the prior service to Babson for these limited number of light poles is insufficient to warrant service to a different customer, Olin, throughout its 70-acre campus (see Section VI.E, infra).

Perhaps recognizing the tenuous nature of its earlier claims, Olin has more recently argued that service by WMLP to Olin should be approved by the Department because there may

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The issue of the temporary service presently provided to Olin through Babson and WMLP facilities is discussed below and is likewise pending before the Department in this proceeding; however, it should in no event be asserted as a basis for a claim of historical service by a provider other than Boston Edison to Olin. Throughout this proceeding, all of the parties have generally agreed to this proposition.

be “plans” to develop some buildings in the future through a joint arrangement between Olin and Babson on land now owned by Babson. This argument, like others that have been advanced by Olin and WMLP, is a red herring, and far too speculative and attenuated to justify service by WMLP to Olin. As the facts in the case developed, it became apparent that as between Olin and Babson these “plans” are tentative, at best, that no formal proposal has been approved by either Olin or Babson, that no funds have been advanced by either institution, that the time frame for such construction is uncertain, that the ownership of the buildings, facilities and land has not been worked out, and that the potential load of Olin in these buildings is neither known nor estimated. Moreover, the basic issue in this case is whether Boston Edison has the right to serve Olin on its 70-acre campus in Needham; it is not whether Boston Edison has the right to serve future buildings on Babson-owned land in Needham or Wellesley. Accordingly, Olin’s argument regarding these future buildings must fail (see Sections VI.C and VI.E, infra).

For its part, WMLP has joined with Olin in many of these arguments. In addition, WMLP has asserted that its right to serve Olin is, in part, related to prior service by WMLP to certain other customers in Needham in some limited circumstances. The circumstances referred to by WMLP as prior service in Needham relate to the Cartwright Road area in Needham, subject to the Department’s ruling in D.P.U. 86-45/86-144; the Design Housing/Grove Street context, which was the subject of a settlement between Boston Edison, WMLP and the respective developer in D.T.E. 01-23; and service to a small hydrogen-sulfide monitoring station owned by the MWRA on the Needham/Wellesley line. As was shown conclusively by Boston Edison during the proceeding, each of these examples is clearly distinguishable from service to Olin in this case. As described in more detail below, issues of Boston Edison’s consent, access to the customer(s) in question because of environmental obstacles (i.e., wetlands), traversing

through Wellesley public ways and/or the acquisition of easements over private property, as well as the relative size of the customers in question in comparison to Olin, completely undermine any analogy that WMLP attempts to draw from these examples. The fact is that, in each of these instances, considerations were present that are not extant in the case of Olin, that Boston Edison made practical and reasonable determinations about its ability to access the customer(s) in question and that Boston Edison agreed to service arrangements that involved WMLP. None of this has application to the matter at hand (see Section VI.D, infra).

With regard to the temporary service currently provided to Olin, Boston Edison maintains that such service is illegal, in violation of several provisions of G.L. c. 164 and inconsistent with Boston Edison's franchise rights. As the facts have been developed in the case, it has been established that Olin has been receiving (and continues to receive) on the order of 1 MW of electricity through facilities owned, operated and maintained by Babson, and from electricity supplied by WMLP. There has been no authorization from the Department received to date, much less requested, by Olin, Babson or WMLP, for this temporary service. Boston Edison submits that the law makes no distinction between permanent and temporary electric service, that such ongoing service is without the Department's imprimatur, and that Babson has been conducting itself as a "distribution company" and providing "distribution" service under G.L. c. 164 to Olin in contravention of the Company's rights thereunder. Boston Edison reiterates its request for the Department to address these circumstances in its final decision (see Section VI.F, infra).

Lastly, Olin and WMLP have introduced arguments relative to cost and reliability as factors that, they believe, the Department should consider in determining Boston Edison's franchise right to serve Olin. On the issue of cost, Olin and WMLP make reference both to the

cost of implementing a specific connection to serve Olin and the rates under which Olin would be served by the Company or WMLP. On the issue of reliability, Olin and WMLP contend that service from WMLP will be more reliable, and thus, Boston Edison should not be granted authorization to serve Olin. The fact is that not only are Olin's and WMLP's cost and reliability arguments predicated on mischaracterizations of the record, they are also totally irrelevant to the seminal legal issue of who (i.e., Boston Edison vs. WMLP) is entitled to serve Olin. This case is not about which utility has the lower rates or the better statistical reliability index; if it were, then the state of the law would be that a customer could be served by whatever utility has the lowest rates or the best reliability statistics in the Commonwealth. That is not the law with respect to the determination of service territories and there is no statutory or precedential basis for such claims. Stated simply, the Company's position has been throughout this case that, in the same manner it serves its more than 650,000 other customers in 39 communities in Massachusetts, including tens of thousands of customers in Needham, Boston Edison is ready, willing and able to serve Olin in a reliable manner, and at a reasonable cost, in accordance with its rates, terms and conditions as approved by the Department. Therefore, Olin's and WMLP's cost and reliability arguments as the basis for determining service territory boundaries are without merit (see Section VI.G, infra).

In the remaining sections of this Initial Brief, Boston Edison discusses these legal and factual issues in more detail, and demonstrates that the Department should deny Olin the relief it seeks in its Petition and determine that Olin is a customer located in Needham to be served by Boston Edison.

V. STANDARD OF REVIEW

By St. 1997, c. 164, § 193, inserting G.L. c. 164, § 1B(a), the General Court directed the Department to “define service territories for each [electric] distribution company ..., based on the service territories actually served on July 1, 1997, and *following to the extent possible municipal boundaries* [emphasis added].” The Department has been entrusted by the Legislature to give practical meaning and force to this codification and mandate by enforcing franchises as they existed on July 1, 1997. Mass. Elec., D.T.E. 98-122, at 6. G.L. c. 164, § 1B(a) further provides that a distribution company, whose territory is so defined by statute and Department action, has “the exclusive obligation to provide such distribution service to all retail customers within its service territory, and no other person shall provide distribution service within such service territory without the written consent of such distribution company which shall be filed with the [D]epartment and the clerk of the municipality so affected.” In this dispute, there has been no consent by Boston Edison; accordingly, the issue regarding service to Olin is properly before the Department for resolution. Mass. Elec., D.T.E. 98-122, at 6.

In such a dispute, two questions must be answered by the Department.⁴ First, what is the import for the instant dispute of the italicized clause in the statute cited in the preceding paragraph: that is (a) how much discretion does the statute give the Department in determining whether it is necessary to deviate from municipal boundaries; and (b) is this an instance in which

⁴ Olin’s Petition makes an alternative request for relief pursuant to G.L. c. 164, § 47A(d). Under section 47A(d), the Department may grant a party relief using the same standards set forth in G.L. c. 164, §§ 47, 60. The Company submits that neither G.L. c. 164, §§ 47 nor 60 apply in the context of Olin. Pursuant to G.L. c. 164, § 47, the Department may permit a municipal light plant to extend its lines into an adjoining town “if such town or a private corporation therein is not then supplying such town with gas or electricity, as the case may be.” Similarly, under G.L. c. 164, § 60, the Department may compel service by a municipal light plant to a customer if that municipal light plant has refused to provide service to such customer. Because Boston Edison does supply electric service in Needham and this is not a case where WMLP has refused to provide service to Olin, neither of these statutory provisions forms a basis for Olin’s alternative request for relief.

the Department should exercise its discretion to permit Olin to take service from a distribution company outside of that company's geographic service territory? Second, would the intended actions of Olin in receiving distribution service from a service provider in an adjacent municipality lead to WMLP's "[provision of] distribution service within [Boston Edison's] service territory"? Id.

Regarding the first question, the General Court was aware in 1997 of the patchwork quilt of service territories and therefore the statute envisions circumstances where cleanly following municipal boundaries may not be possible without giving rise to anomalies. Id. Hence, it follows that the Legislature accorded the Department discretion to depart from municipal boundaries in resolving service territory disputes, *if facts and fairness so warrant.*" Mass. Elec., D.T.E. 98-122, at 7 (emphasis in original). In exercising its discretion, the Department's analysis properly focuses on the customer and the applicable geographical characteristics of that customer's location, and not the respective utilities, in reaching a fair resolution in these matters. Id. at 8. Where the customer's premises are an uninterrupted parcel owned in fee or leased by the customer, where those premises straddle a municipal boundary and thus straddle the presumptive line between two electric distribution companies, and where there is no evidence that the customer engaged in land conveyance or lot merger to get around or defeat the central intent of G.L. c. 164, § 1B(a), the Department has determined that the customer may have a choice of provider. See id. Conversely, where these circumstances are not present, the legislative mandate to follow municipal boundaries in enforcing franchise rights is paramount. See G.L. c. 164, § 1B(a). However, even where a customer's land-use rights straddle two utility franchise areas, the Department has also strongly cautioned against, "reconfigur[ing] or manipul[at]ing lot or parcel boundaries ('creative conveyancing,' so to speak) ... in order

artificially to defeat the principal purpose of § 1B(a), viz., to conform electric distribution service territory boundaries” Mass. Elec., D.T.E. 98-122, at 11 (footnote omitted). Specifically, the Department has stated: “[p]etitions based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer’s premises into a different service territory, will labor under a considerable burden to show that allowing the petition does not thwart Legislative intent.” Id.

It is in accordance with this statutory framework that the Department reviews the facts of franchise boundary disputes and determines whether it is appropriate for a disputed customer to receive distribution service from a source other than its incumbent utility provider and whether the provision of service by such a source would thwart the Legislature’s intent to institutionalize service territory boundaries.

VI. ARGUMENT

A. Needham Is Within Boston Edison’s Service Territory Pursuant to G.L. c. 164, § 1B(a).

1. Boston Edison Has Historically Provided Distribution Service to Needham, and Therefore, Boston Edison Has the Exclusive Right to Serve Customers Located In Needham.

As stated above, G.L. c. 164, § 1B(a) defines the service territories of electric distribution companies as “the service territories actually served on July 1, 1997, and *following to the extent possible municipal boundaries*” (emphasis added). The Department has interpreted this language to authorize the agency to depart from municipal boundaries “*if facts and fairness so warrant.*” Mass. Elec., D.T.E. 98-122, at 7 (emphasis in original).

On July 1, 1997, Boston Edison was the sole provider of electric distribution service in Needham (Exh. BE-JJN-1, at 15). In fact, Boston Edison has been providing distribution service to Needham since the beginning of the 20th century. Indeed, beginning in 1903, several contracts

were executed between Boston Edison's predecessors and Needham regarding the provision of electric service in the town (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 15-16). These contracts contain language providing Boston Edison broad rights to distribute electricity service to Needham and demonstrate a long-standing and extensive relationship between the Company and the town (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 15-16). In this series of agreements spanning many years, Boston Edison acquired extensive rights to light streets, town offices and buildings, and buy wires, poles, transformers, etc. in furtherance of providing electric service in Needham for the purpose of serving electricity customers in Needham (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 16). Also, Boston Edison was granted the applicable "locations" to own and place wires in the streets, squares and ways of Needham (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 16). These agreements demonstrate an historical and long-standing presence of Boston Edison as the utility providing electric service to Needham.

2. Boston Edison Currently Provides Exclusive Distribution Service Throughout Needham.

In addition to Boston Edison's historical provision of service to Needham, the Company currently serves tens of thousands of customers within Needham. This includes service to areas immediately adjacent to and surrounding the Olin campus (Exhs. IR-OC-1-19(A) Att. Supp.; IR-OC-1-19(B) Att. Supp.), as well as service to various buildings on the Olin campus itself (Exh. OC-2, at 5). The Company's facilities in Needham consist of extensive wires, poles, conduits, transformers, substations and meters on virtually every street in Needham and thereby providing service pursuant to Department-approved tariffs and terms and conditions to a vast group of residential, commercial and industrial customers. In particular, as shown through detailed diagrams of Company-owned primary and secondary distribution facilities, Boston Edison has substantial facilities located on Great Plain Avenue, Forest Street and Central Avenue, from

which service to Olin would be effected (Exhs. IR-OC-1-19(A) Supp. Att.; IR-OC-1-19(B) Supp. Att.). Additionally, Boston Edison has all of the franchise rights, grants of location, and access to public ways necessary to serve customers located in Needham.

The record in this case does not reflect that any other electricity provider, including WMLP, has been granted such rights by Needham or has such facilities in Needham. In fact, until this proceeding was initiated by Olin, WMLP had maintained the position before the Department that WMLP did not have the legal authority to serve customers located outside of Wellesley. See Wellesley Department of Public Works, D.P.U. 86-45/86-144 (1986) (hereinafter referred to as "Wellesley Dept. of Pub. Works"). Specifically, during a prior case involving a service territory dispute between WMLP and Boston Edison, docketed by the Department as D.P.U. 86-45/86-144, WMLP took the position that it had no right to serve in Needham and that Boston Edison held the exclusive franchise to serve that municipality (see generally Exh. BE-1). This claim was advanced by the former director of the Wellesley Board of Public Works who stated:

[Wellesley] does not see that it has the legal authority to serve the requested electricity connections in Needham which exist outside Wellesley. The [Wellesley] Electric Division does not have the franchise, charter, Wellesley or Needham votes, easements on public and private ways, Needham approvals, state legislative or regulatory approvals or authority to serve these new developments in Needham

(Tr. 2, at 206-207; Exh. BE-1, at 8).

In contrast, during this case, WMLP has asserted that it has the right to serve Olin based on some level of prior service to a small portion of the then-Babson campus, as well as a few limited instances of service by WMLP along the Needham-Wellesley border. These circumstances are discussed in detail below (see Section VI.D, infra) and offer no support for the

conclusion that WMLP has the franchise right to serve Needham, in general, or the Olin campus, in particular.

Thus, based on Boston Edison's historical provision of service to Needham, its particular provision of service to Needham on the date on which service territories were confirmed by statute (i.e., July 1, 1997), and its current provision of service throughout Needham (including to Olin), Boston Edison has an exclusive franchise right to serve electric distribution customers located in Needham. G.L. c. 164, § 1B(a). Accordingly, Boston Edison has the exclusive right to serve Olin as a new customer located in Needham.

B. Olin College Is Located Exclusively in the Town of Needham.

As stated in Section II, supra, by any reasonable measure, Olin is located squarely in Needham. It is uncontroverted that all of Olin's current buildings are located in Needham and that all of Olin's electricity load from those buildings is in Needham (Exhs. IR-BE-1-1A Att.; IR-BE-1-4 Att.; IR-BE-1-20; IR-BE-1-21; BE-ARJ-4; Tr. 1, at 47). Olin receives all of its other utility services, including water, sewer, natural gas and cable, from Needham providers (Exhs. IR-BE-1-23; IR-BE-1-24; IR-BE-1-25; IR-BE-1-26; Tr. 1, at 47-50). Olin's only mailing address is in Needham (Tr. 1, at 49). Except for its belated and negligible 1,000 square-foot land acquisition in Wellesley, the totality of Olin's land ownership in fee is in Needham (Exhs. IR-BE-1-1A Att.; IR-BE-1-1B Att.; IR-BE-1-1C Att.; IR-BE-1-5A Att.; IR-BE-1-5B Att.; IR-BE-1-5C Att.; IR-BE-1-1D Att.).⁵ The 1,000 square feet in Wellesley is a non-buildable parcel of land Olin purchased a year-and-a-half after the campus was purchased from Babson (Tr. 1, at 24-25; Exhs. IR-BE-1-4 Att.; IR-BE-1-1B Att.). Indeed, Olin purchased this parcel only to support its

⁵ The sum total of Olin's land ownership, even reflecting its 1,000 square-foot spot of land in Wellesley, indicates that 99.97 percent of these land holdings are in Needham (see Exhs. IR-BE-3-14; IR-BE-1-1A Att.).

Petition in this case and has admitted during hearings that it has no plans to use that parcel in any manner at the current time (Tr. 1, at 38-39; Exhs. OC-2, at 9; IR-BE-1-5 Supp.). Moreover, the deeds for real property in this case demonstrate that Olin holds no other fee interest in land in Wellesley (Exhs. IR-BE-1-4 Att.; IR-BE-1-7B Att.).

In short, Olin has no factual characteristics that would justify a finding by the Department that Olin is located in Wellesley, or that electric service to the campus should be from a source other than Boston Edison, as the franchised distribution company serving Needham.

C. Boston Edison Is Ready, Willing and Able to Provide Olin With Reliable and Cost-Effective Service.

1. Boston Edison Can Serve Olin Reliably and at Reasonable Cost in Accordance with Its Department-Approved Tariffs.

Boston Edison is ready, willing and able to provide reliable and cost-effective distribution service to Olin, in accordance with its rates, terms and conditions (Exhs. BE-JJN-1, at 22; BE-ARJ-1, at 9). Indeed, Boston Edison has ample facilities located along Great Plain Avenue, directly adjacent to the Olin campus, which are sufficient to supply Olin's entire current load of approximately 1 to 1.5 MW immediately and at little or no incremental interconnection cost (see Tr. 4, at 511-512, 609-610; Tr. 5, at 814-815). Moreover, Boston Edison is able to provide permanent service for Olin's full load, estimated to be ultimately around 4 MW, with various upgrading of equipment and facilities, as demonstrated by the variety of preliminary, conceptual options presented to Olin by Boston Edison (see, e.g., Exhs. BE-ARJ-2; BE-ARJ-1, at 9-13).

As explained by Mr. Niro in his pre-filed testimony, Boston Edison's initial proposals for the provision of service to Olin were conceptual because Olin had failed to provide information necessary for the Company's engineering staff to design specific plans tailored to Olin's particular needs, despite repeated requests from the Company for such information (Exh. BE-JJ-

1, at 6; Tr. 6, at 870). Therefore, Boston Edison provided Olin with five preliminary design options for service, with some of these options involving significant construction costs because Olin had indicated its preference that the service be underground with a redundant back-up supply (*id.*; Exh. BE-ARJ-2). Specifically, the option favored by Olin, Option 1B, was estimated to include roughly \$1.6 million in construction costs, and provided a completely dedicated, underground normal supply line to Olin with a redundant and independent back-up supply (Exh. BE-ARJ-2). However, as described by Mr. Jessa in his pre-filed testimony, the Company also provided options that would involve significantly lower construction costs, with comparable levels of reliability (*id.*; Exh. BE-ARJ-1, at 10-13). Thus, from the outset, Boston Edison has tried to provide Olin with a wide range of options for Olin to consider regarding distribution service. These options were constrained by the limited information that Olin provided to Boston Edison and various assumptions Company engineers were forced to make to compensate for the inadequate supply of information from Olin (Tr. 6, at 870).⁶

Moreover, based on information that Boston Edison has learned for the first time during evidentiary hearings, the Company would be able to provide many more options for Olin's consideration (Tr. 5, at 815). For example, Boston Edison learned for the first time during hearings that Olin does not require completely separate and redundant lines (*i.e.*, not subject to

⁶ As stated by Mr. Niro, based on discovery in this proceeding, it became clear to the Company that Olin had been providing significant amounts of information to WMLP to assist WMLP in planning its distribution service to Olin, while refusing to provide the same information to Boston Edison (Tr. 5, at 786). Mr. Newell, of WMLP, himself acknowledged that a distribution company needs detailed, specific information from a customer in order to design a proper service and that continued communication and cooperation between the distribution company and its customer are integral to designing an optimal service (Tr. 3, at 319). Because of Olin's refusal to provide Boston Edison with complete information regarding its load, size, plans and design requirements, Boston Edison engineers were forced to make some assumptions in creating the options presented to Olin in June 2001 (Tr. 6, at 870). Accordingly, these designs were only conceptual in nature and were not necessarily the Company's final word on engineering options to serve Olin (*id.*).

common-mode distribution failure), as evidenced by WMLP's proposal to serve Olin with two lines located in the same ductbank (Tr. 3, at 307). In each of Boston Edison's five preliminary options, per the understanding received from Olin at the time, the normal and duplicate supply shared no common ductbanks (Exh. BE-ARJ-2; Tr. 6, at 870). In each of these five options, Boston Edison had two means of entering Olin – from Great Plain Avenue and from Forest Street – in order to maintain redundancy of supply (Exh. BE-ARJ-2; Tr. 6, at 870). Based on the knowledge that Olin does not require normal and duplicate supplies to be completely independent and redundant, Boston Edison can design an array of additional options for serving Olin at a lower cost (Tr. 5, at 815).

Similarly, Boston Edison designed each of its previous options to supply 4 MW of power immediately (Tr. 4, at 609-610). However, with the knowledge that the current load is only 1 to 1.5 MW and the maximum load, in the 3 to 3.5 MW range, will not be reached for eight to ten years, Boston Edison is in the position to provide many more options for service to Olin (Tr. 5, at 814-815; Tr. 4, 609-610; Tr. 1, at 22-23). Mr. Niro referred several times to the new options that Boston Edison had designed for providing service to Olin, and stated that Mr. Jessa, being the engineer who formulated those options, would be able to explain them in greater detail during his testimony (see, e.g., Tr. 5, 813-814). Apparently, neither Olin nor WMLP were interested in hearing information concerning the new options Boston Edison had created based on facts learned during the hearings, because both Olin and WMLP declined to cross-examine Mr. Jessa whatsoever (Tr. 6, at 882-883).⁷

⁷ If reliability and cost are truly such vital concerns that, Olin and WMLP believe, relate to service to Olin and the determination of service territory boundaries, then it is astonishing that Olin and WMLP did not cross examine the Company's lead engineer on these issues. Their failure to inquire about the cost and reliability of Boston Edison's options to serve Olin, as revised with updated information discovered during hearings, completely belies their overall position in this case. As a matter of candor, Boston Edison

(footnote continued...)

It bears noting that there is nothing unique about the Company's ability to serve Olin, Olin's electricity needs or Boston Edison's proposals to provide service to Olin. Boston Edison provides distribution service to more than 650,000 residential, commercial and industrial customers throughout its service territory. The Company's service to customers includes customers of much larger (and smaller) size, as well as customers with very specific needs for service design and reliability, including sophisticated computer component manufacturing facilities, scientific laboratories, hospitals, such as Newton-Wellesley Hospital, and other educational institutions such as Bentley College, Boston College and Regis College (Exh. BE-ARJ-1, at 9; Tr. 3, at 424; Tr. 4, at 584). Based on its past and continued service to institutions such as those just mentioned, Boston Edison is extremely qualified, and clearly able, to provide Olin with high-quality, reliable distribution service.

The fact that Boston Edison is fully capable of providing reliable distribution service to Olin and that there are numerous options for providing such service does not mean that all of those options are without cost. The Company's approved terms and conditions provide in essence that the cost of establishing a customer interconnection, less any system-development benefit and any applicable revenue credit, is the responsibility of the customer (Exh. IR-OC-1-7 Att.). The final amount of such customer contribution, if any, is open to discussion, just as the choice of service option is open to discussion. The requirements of the terms and conditions, however, are not debatable or optional.

(...footnote continued)

submits that their conscious decision to forgo cross examining the Company's lead engineer on these otherwise professed critical issues reveals that there is no genuine concern regarding Boston Edison's interconnection costs and/or reliability in serving Olin.

The record is replete with discussion of the cost of various options, the potential for considering any of that cost as “system development,” and the amount of revenue credit to which Olin may be entitled based upon various assumptions as to its initial and eventual load (see Exhs. Att. OC 1-7; OC 1-8; Tr. 5, at 791-792; Tr. 6, at 848-849). The fact is that this has been a moving target throughout this proceeding, caused by Olin’s changes in underlying assumptions as the case proceeded. Ultimately, what the record does show is that Boston Edison can provide service and the net interconnection cost can range from very little, to substantial, depending upon what Olin believes it must require (Exh. BE-ARJ-2; Tr. 5, at 814-815). A final determination of cost is not necessary in order to resolve in which service territory Olin is located (see Section VI.G, infra); nor is it possible to determine the particular option for service to Olin based on this record. Also not relevant, or possible, is a detailed option-by-option comparison of Boston Edison costs versus those of WMLP. The question of service territory is not a matter of competitive bidding. What Boston Edison can commit to, as with any new customer, is its willingness to work closely with Olin to provide service in accordance with the Company’s terms and conditions in a cost-effective and reliable manner.

2. Boston Edison Is the Only Distribution Company Authorized to Serve Olin’s Campus.

Boston Edison is currently serving several portions of the Olin campus, and has served these locations for many years, since the property was owned by Babson. The specific addresses served by Boston Edison include: 1735 Great Plain Avenue, 1763 Great Plain Avenue, 1795 Great Plain Avenue, 1809 Great Plain Avenue and 36 Curtis Road (Exhs. BE-JJN-1, at 20-21; OC-2, at 5). It bears noting that Boston Edison has two accounts for the 1763 Great Plain Avenue address, one of which serves Babson’s baseball field, which is located directly adjacent to the area where construction of Olin’s new buildings is occurring, and the other of which is for

Olin's administrative building at that address (Tr. 1, at 60; Exhs. BE-ARJ-4; BE-JJN-1, at 21). Thus, Boston Edison served on July 1, 1997, and continues to serve, large portions of the Olin campus.

During hearings, Olin and WMLP attempted to suggest that they are seeking approval from the Department for WMLP to serve only Lot 2 of the Olin campus, Lot 2 being the location where the new construction is currently occurring (see Exh. BE-ARJ-4; IR- BE-1-1A Att.; Tr. 3, at 304-305, 311-312, 315). However, there is no clear definition of Lot 2 because the several maps provided in this case do not specifically indicate the boundary between Lot 2 and Lot 5 (see Exhs. BE-ARJ-4; IR-OC-1-1A Att.; Tr. 3, at 305 (statement by Olin's witness Mr. Hannabury: "I can't distinguish between Lot 2 and Lot 5")). Further, WMLP's Director, Mr. Joyce, stated that, if the Department approved Olin's Petition for WMLP to serve Lot 2, WMLP may also view itself as having a right to serve Lot 5, which is adjacent to Lot 2 but does not directly abut any part of Wellesley (Tr. 3, at 315-316; Exh. IR-BE-1-1A Att.).

Moreover, because the entire Olin campus (less the 1,000 square-foot parcel) was transferred to Olin through a single deed from Babson and because Olin's 70-acre parcel is being used as a contiguous campus, the Olin campus is, from a legal perspective, a single parcel (Exh. IR-OC-1-4 Att.). Although the deed transferring the property to Olin reflects six separate lot designations, these lot designations were not used to subdivide the parcel; instead, the lot descriptions were used only to designate the parcels in the deed (Exh. IR-BE-1-4 Att.). Indeed, the facts of this case dictate that Olin is a single campus and its distribution service should not be divided by lots. Specifically, Olin is a large, ultimately 3.5 to 4 MW, customer located on a contiguous 70-acre parcel of property located totally in Needham. Olin has constructed new, permanent facilities on portions of its campus, specifically Lot 2, and has temporary structures

on other parts of the property, Lot 5 (Exh. BE-ARJ-4). Further, Boston Edison provides distribution service to the rest of Olin's various lots on the campus, including 5, 7, 8, 24 and 66 (Tr. 1, at 66-67; Exh. BE-ARJ-4). This service by Boston Edison occurred prior to July 1, 1997, is currently ongoing and comparatively encompasses much more of the Olin campus than the alleged historical service formerly provided to Babson within a very small portion of the then undeveloped Lot 2.⁸

Further, Olin's Petition in this case makes no distinction between Lot 2 and the other lots on the Olin campus, nor does it seek to limit the Department's approval for Olin to receive service from WMLP for only Lot 2 in any way. Nor has Olin amended its Petition to be consistent with this more recent claim. Olin's reference to Lot 2 is an 11th-hour attempt to limit the scope of Olin's request in order to induce the Department into making a decision that would be both sweeping in scope and contrary to its decision in Massachusetts Electric Company, D.T.E 98-122. This would undoubtedly become a slippery slope, leading to Olin being served throughout its campus by WMLP. Because WMLP has acknowledged that it may use any approval to provide service to Lot 2 as a basis to provide service to later developments on other portions of the Olin campus, and because Olin may very well in the future construct additional facilities outside of Lot 2, the dispute in this case as defined in Olin's Petition is not limited to Lot 2, but includes the entire Olin campus (Tr. 3, at 315-316). Accordingly, the Department should consider Olin's property to be a single tract of land, and not limit its ruling, as most recently suggested by Olin and WMLP, to only Lot 2.

In addition to serving portions of the Olin campus itself, as described above, Boston Edison serves areas immediately adjacent to the Olin campus in Needham. For example, Boston

⁸ This limited, prior service to Babson within Lot 2 is discussed in more detail below.

Edison supplies a large assisted-living facility located to the east and directly next to Olin on land actually owned by Babson (and leased to the assisted living facility) (Exhs. BE-ARJ-4; IR-BE-1-1A Att.; IR-WMLP-2-1 Att.). This facility is substantial, has several accounts with Boston Edison, and is served by facilities located off of Central Avenue in Needham (Tr. 1, at 59; Exh. BE-JJN-1, at 21). Also, Boston Edison provides service to all of the numerous residential accounts along Great Plain Avenue in Needham. Consistent with this service to Great Plain Avenue, Boston Edison provides service to Olin's various buildings along Great Plain Avenue, the Babson baseball field, and also to Babson's buildings located in Needham, including 46 Burrill Lane and 137 Forest Street (Tr. 1, at 59; Tr. 2, at 604).

In contrast, WMLP is not currently authorized to provide distribution service to any part of the Olin campus.⁹ WMLP provides distribution service to Wellesley and to a few outlying areas of Needham that are accessible only through Wellesley, as discussed in more detail below. WMLP also provides service to the Babson campus in Wellesley and, through Babson's internal distribution network in Wellesley, to small areas of the Babson campus that straddle the town boundary in Needham (Exh. BE-ARJ-4). Because this provision of service to a single customer's straddling property is consistent with the Department's ruling in Massachusetts Electric Company, D.T.E. 98-122, Boston Edison recognizes this as the legitimate provision of service to a straddling customer located partially in Needham; however, it is not precedential for

⁹ The parties have agreed that WMLP's provision of temporary service to Olin should not be considered in determining which utility should be authorized to provide permanent service to Olin. Notwithstanding WMLP's concession that the provision of the disputed temporary service should not be a basis to establish an historical claim relative to service to Olin, Mr. Joyce and Mr. Newell both testified that WMLP has historically provided service to the area of the Olin campus, and that WMLP continues to provide such service (Tr. 2, at 235, 282-283; Exhs. WMLP-2, at 8; WMLP-7, at 3). The only current service that WMLP has provided to the Olin campus is the disputed temporary service that is distributed by Babson (Tr. 2, at 238), and, accordingly, should not be given any weight by the Department in this proceeding.

Olin, as a new, non-straddling customer, located exclusively in Needham, to be served by WMLP.

Olin's and WMLP's prior service to Lot 2 argument rests on a group of light poles formerly on Babson's campus. In the past, WMLP supplied electricity to Babson in Wellesley and Babson then distributed that power through its own facilities to a group of light poles on a very small part of what is now Lot 2 of the Olin campus, located in Needham (Tr. 2, at 236-237). Specifically, these Babson light poles were along the former location of Map Hill Drive (id.), within an area that had been part of Babson's Coleman parking lot (Exh. WMLP-2 Att.), and along pathways in that area (Tr. 2, at 236). At the time that such service existed at those locations, the undeveloped land was owned by Babson, and not Olin (Tr. 2, at 243). With the sale of the parcels to Olin, all of these lighting facilities have since been removed and no longer exist at those locations (Tr. 2, at 237-238, 243). These facilities were removed prior to the commencement of construction of the new buildings on the Olin campus and, indeed, even prior to the property being sold to Olin (id.). Accordingly, these light poles never existed when the property in question was owned by Olin. Therefore, WMLP has no prior record of ever having Olin as a customer at this, or any, location.

As an additional matter, as mentioned previously, service to this area consisted of only the group of light poles (Tr. 2, at 236-237). Accordingly, the load for such service was quite small and did not include service by WMLP to Babson buildings or other facilities on Lot 2. Further, service to these light poles was as a result of Babson's status as a straddling customer in both Wellesley and Needham and through Babson's own internal distribution-network, critical characteristics that Olin does not possess. Thus, the previous provision of service to these poles on the undeveloped portion of the former Babson campus is in no way similar or comparable to

the magnitude of service currently or anticipated to be received by Olin at the same location or throughout its 70-acre campus (Tr. 2, at 236-237). Based upon the above, Olin's and WMLP's argument regarding previous service to this group of light poles on Lot 2 lacks merit in determining which utility should be authorized to provide permanent service to Olin.

D. None of the Prior Instances of WMLP's Provision of Service to Border Customers in Needham Is Relevant to Olin Because of Vast Differences in Each of the Scenarios.

WMLP has sought to make much out of a few isolated situations where WMLP has provided electric service, directly or indirectly, to customers located on the Needham-Wellesley border. However, close examination of these situations does not help WMLP or Olin. Rather, it tends only to confirm the axiom that it is the exceptions that prove the rule, and, in this case, shows clearly that the appropriate service territory boundary between Boston Edison and WMLP is the municipal boundary and that each apparent "exception" to that rule is supported by unique factual circumstances and is fully consensual. None of these situations is analogous to that of Olin, nor do they suggest either that Olin would have a right to be served by WMLP, or that Boston Edison should somehow be compelled to "consent" to Olin being served by WMLP.

Specifically: (1) Olin is located squarely in Boston Edison's service territory; (2) Boston Edison can easily provide service to Olin in a variety of ways, including off of Great Plain Avenue and/or off of Forest Street; (3) the costs to provide such service to Olin are not large (indeed they could be zero, considering the potential revenue credit, depending upon Olin's eventual load and its choice regarding the necessity of underground service) compared to the amount of load involved; and (4) there are no access, land use or environmental issues that would constitute a difficult or potentially insurmountable obstacle to Boston Edison's provision of distribution service. This is in direct contrast to the cited instances where Boston Edison has provided consent to WMLP to provide limited service along the Needham-Wellesley border,

namely, along the Cartwright Road area and at the MWRA monitoring facility located on the Needham-Wellesley town line, each of which is discussed in greater detail below. It is also in contrast to the Design Housing development off of Grove Street in Wellesley, where Boston Edison actually provides distribution service to the relevant customers in Needham through a primary-metered connection with WMLP. Given WMLP's focus on these situations, and, in particular its apparent pre-occupation with the service to the MWRA monitoring facility off of Winding River Road (see, e.g., Rebuttal Testimony of Richard Joyce (Exh. WMLP-2), it may be useful to examine briefly each of these situations, simply to demonstrate how inapt is any comparison with the situation at Olin.¹⁰

1. Cartwright Road Area

Cartwright Road is a local road that begins in Wellesley and terminates as a series of looping dead-end streets in Needham, including Lehigh Road and Cornell Road (together, the "Cartwright Road area"). See Wellesley Dept. of Pub. Works, D.P.U. 86-45/86-144, at 4 (1987). This Cartwright Road area is accessible only through Wellesley roads (Exhs. BE-2; BE-JJN-2, at 4). In addition, there are significant wetlands behind the Cartwright Road area that block any vehicular access from Needham (Tr. 3, at 386; Exh. BE-JJN-2, at 4). Wellesley Dept. of Pub. Works, D.P.U. 86-45/86-144, at 10. WMLP has provided service to the Wellesley customers along Cartwright Road, and 14 homes along the Needham stretch of Cartwright Road, since

¹⁰ One other Needham-Wellesley border situation bears brief mention here, but is discussed more fully elsewhere. That is the situation involving the portions of the Babson campus that are located over the town boundary in Needham and that would appear to qualify Babson as a "straddling customer" which may choose to be served by a single supplier. The fact that Babson has historically chosen to receive service from WMLP as to its main campus, which is mainly in Wellesley but extends partially into Needham, and has chosen to receive service from Boston Edison as to various other buildings and facilities located entirely in Needham (see Exh. BE-ARJ-4, which depicts the areas served by both entities) merely serves to confirm the unique status of straddle customers (see also Suffolk Downs, WS Development Associates LP, (Exh. IR-OC-1-1) and Stop & Shop (Mass. Elec., D.T.E. 98-122)) but does nothing, per se, to modify the view that the boundary of the service territory should in general follow the municipal boundary.

1918. Id. at 4. In 1987, the Department further ordered WMLP to provide service to four new homes being built along the Needham stretch of Cartwright Road. Id. at 23.

At that time, Boston Edison reviewed the options for providing service to those customers, and determined that, based on the distance of those homes from existing Boston Edison facilities, intervening access constraints because of the need for the Company to go through Wellesley public ways or substantial wetlands, and the relative ease with which WMLP could provide service to those customers, Boston Edison would consent to WMLP's provision of service to those new houses (Tr. 3, at 386). Wellesley Dept. of Pub. Works, D.P.U. 86-45/86-144, at 10. Indeed, for Boston Edison to extend its facilities to reach those four homes on Cartwright Road would have required Boston Edison to acquire rights to use or place utility poles along several miles of roads in Wellesley, something that WMLP currently would oppose and has opposed in the past (Tr. 2, at 228). Alternatively, to reach those homes through land in Needham would require the Company to traverse a significant area of wetlands that separated the Cartwright Road area from Boston Edison's closest facilities in Needham, along Mary Chilton Road (Exh. BE-JJN-2, at 4). Wellesley Dept. of Pub. Works, D.P.U. 86-45/86-144, at 4, 10.

Boston Edison's consent to WMLP's provision of service to the Cartwright Road area is completely distinguishable from the facts concerning service to Olin. First, Boston Edison has facilities sufficient to serve Olin located off of Great Plain Avenue or Forest Street in Needham immediately adjacent to the Olin campus, unlike in the Cartwright Road case (Exh. BE-ARJ-2). Second, Boston Edison would not have to acquire rights from another town, nor traverse wetland areas, in order to provide service to Olin (Exh. BE-JJN-2, at 4). Third, Olin is a significant customer, whose large load would provide a revenue credit that would either largely or totally offset potential construction costs (id.). In contrast, the few homes in the Cartwright Road area

would not have had a significant load and would not have been eligible for a large revenue credit. Moreover, the costs of construction would have been so high (to go along Wellesley streets or to span the intervening wetland area) that the customer(s) would have had to pay a significant amount for the Company's interconnection construction costs. Wellesley Dept. of Pub. Works, D.P.U. 86-45/86-144, at 4, 10. Given the absence of any comparable constraints in serving Olin, the Department's decision directing WMLP to provide service, which was also the position that was advocated by Boston Edison in that proceeding, provides no support to WMLP or Olin in the present case (Tr. 3, at 386).

2. Design Housing/Grove Street

More recently, Boston Edison and WMLP reached an agreement for the provision of service to the Design Housing development off of Grove Street in Wellesley ("Design Housing") (Tr. 3, at 281). Design Housing is located on a brand new dead-end street that begins in Wellesley (off of Grove Street), but terminates in Needham (Exh. BE-JJN-2, at 7). There is no access to the Needham portion of Design Housing through Needham streets (*id.*). Indeed, the only access to Design Housing is from Grove Street in Wellesley or through private property, and there are significant wetlands areas that prevent Design Housing from being accessed through Needham (*id.*). This matter came before the Department as D.T.E. 01-23; however, the case was settled between WMLP, Boston Edison and the Design Housing developer, and, accordingly, the parties filed a stipulation of dismissal, disposing of the case (Tr. 2, at 213). Ultimately, the settlement reached in that case permitted the Design Housing homes located in Needham to be served by Boston Edison as direct customers of the Company, with Boston Edison receiving primary-metered service from WMLP (Exhs. BE-JJN-1, at 20; BE-JJN-2, at 7). Thus, the customers in the Design Housing area are being served as customers of Boston Edison,

and Boston Edison is being served by WMLP (see Exhs. IR-OC-1-1; BE-JJN-1, at 20; BE-JJN-2, at 7).

This situation is different from service to the Olin campus in many of the same ways that the Cartwright Road example is distinguishable. Significantly, to reach the Design Housing area, the Company would have had to acquire rights along streets in Wellesley, gain access through private property or traverse wetlands. Additionally, as mentioned above, permission from WMLP to attach to their poles to place Boston Edison electric facilities is problematic (Tr. 2, at 228; WMLP-RR-4). Although, unlike the Cartwright Road example, a settlement was reached with respect to Design Housing that has Boston Edison serving the customers based upon a primary-metering arrangement with WMLP, Boston Edison views primary metering as an option only when it is not feasible for the Company to provide service in a practical manner to customers in its service territory (Tr. 3, at 385-386). This primary metering solution is not a viable option in the Olin case because: (a) Boston Edison can easily provide service to Olin; (b) the Company's facilities are located directly adjacent to the Olin campus; (c) there are no access issues through Wellesley, or land use, wetlands or distance concerns that prohibit Boston Edison reaching the site; and (d) Olin's large load and potential revenue credit make the cost to connect to Olin reasonable. Accordingly, the settlement in the Design Housing case does not negate or undermine Boston Edison's right to serve the Olin campus.

3. MWRA Monitoring Station

Lastly, Boston Edison consented to WMLP's provision of service to a small MWRA hydrogen-sulfide monitoring station located in Needham, next to the Wellesley border off of Winding River Road (Exhs. WMLP-8; Exh. IR-BE-4-2, Exhibit 1). This MWRA location has virtually no load and essentially pays only a nominal monthly customer charge (Exh. WMLP-RR-2 Att.). Boston Edison did not have facilities that were immediately accessible to the

MWRA site without requiring Boston Edison to install several poles and acquire rights along Wellesley streets or through the property of a private homeowner in Needham (*id.*). Access through Wellesley would have required obtaining consent from the WMLP either to use WMLP poles or to place duplicate Boston Edison poles in Wellesley (*id.*). Again, WMLP has opposed granting consent to Boston Edison in these situations in the past (Tr. 2, at 228; WMLP-RR-4). Similarly, acquiring rights through a private homeowner's residential property is difficult and costly, making access to the MWRA site through the property at 161 Winding River Road infeasible (Tr. 5, at 712).

Because of these complications, Boston Edison estimated the cost of providing such service to the MWRA location to be in excess of \$10,000 and believed that this cost to the customer was not justified based on the negligible customer load and the ease with which WMLP could provide service (*id.*). Indeed, WMLP had a pole and distribution line located directly across from the access road leading to the MWRA site and could provide service much more conveniently than Boston Edison (*id.*; Exh. WMLP-8).¹¹ Accordingly, the Company provided its consent for WMLP to serve the small MWRA load in this instance.

Notwithstanding WMLP's protests to the contrary and their detailed parsing of Boston Edison's letter providing consent for WMLP service to the MWRA location, the Company's consent in the MWRA situation is not at all comparable to the Olin case. In the case of the

¹¹ Despite WMLP's claim to the contrary, the pole in question is a WMLP pole in Wellesley to which WMLP has use rights (Tr. 6, at 852; WMLP-RR-5; *cf.* Exh. WMLP-8). Indeed, an NSTAR registered surveyor developed plans that showed the pole is located in Wellesley (Tr. 6, at 852), and Boston Edison produced confirming records in response to a WMLP record request (RR-WMLP-5). The first record is an internal Boston Edison pole record dated September 3, 1987, noting that pole number 23 (the pole at issue) is located in Wellesley (*id.*). The second record is a Verizon pole record that shows that pole 23 is located in Wellesley and that WMLP has a 55 percent ownership interest in that particular pole (*id.*). The fact is the closest pole to the MWRA service is located in Wellesley on which WMLP has service rights, and Boston Edison's closest pole is over 250 feet away in Needham (Tr. 2, at 227-228).

MWRA monitor, it was clear that WMLP could more easily access the site, that WMLP had facilities in closer proximity to the customer, and that the charges that the customer would incur to receive service from Boston Edison would not be offset because of the small load involved (Exh. BE-JJN-2, at 16). Access to the MWRA hydrogen-sulfide monitor would have involved difficult issues and additional costs by necessitating rights to be secured to traverse Wellesley public ways or to obtain an easement over private property (*id.*). This is entirely different from the Olin case where Olin is a very large customer, entitled to a significant revenue credit, and whom Boston Edison can easily supply through various routes without any access constraint (*id.*; Exh. BE-ARJ-2).

E. This Is Not an Instance Where the Service Territory Should Vary From Municipal Boundaries Because Olin Engaged in Creative Conveyancing to Circumvent Chapter 164.

In its recent decision in Massachusetts Electric Company, D.T.E. 98-122, the Department strongly cautioned against “creative conveyancing.” D.T.E. 98-122, at 11. This was defined, in part, as reconfiguring or manipulating lot or parcel boundaries artificially in order to defeat the requirement that service territory boundaries follow municipal boundaries to the extent possible. *Id.*¹² The Department stated that “[p]etitions based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer’s premises into a different service territory” would be subject to the burden of having to show that the petition does not “thwart Legislative intent.” *Id.* For the reasons discussed below, Olin has attempted several forms of “creative conveyancing” in order to avoid taking

¹² The Department also noted in its decision in Massachusetts Electric that allowing a straddling customer to select its electric distribution company was limited to situations “where there is no evidence that the customer engaged in land conveyancing or lot merger to get around or defeat the central intent of G.L. c. 164, § 1B(a).” D.T.E. 98-122, at 8.

distribution service from Boston Edison and it has failed to show that its preferred receipt of service from WMLP does not thwart legislative intent.

1. Olin Has Engaged in Several Forms of Creative Conveyancing to Support Its Petition to Receive Distribution Service From WMLP.

Olin's initial, and most obvious, attempt at creative conveyancing, is evident in its purchase of 1,000 square feet of land in Wellesley (Exh. IR-BE-1-4 Att.). The deed for this property is dated October 31, 2001, just ten days before the filing of Olin's petition in this matter (*id.*). This land transfer with Babson was completed approximately one-and-a-half years after the sale of the rest of the 70 acres of Olin's campus (*id.*). Moreover, the sale of the 1,000 square feet was clearly made only so that Olin could place its switchgear at that location, allowing Olin to repeatedly make the claim in its Petition that it would be taking service from WMLP on land it owned in Wellesley (Exh. IR-BE-1-7A Att.; Tr. 1, at 26). The size of this parcel was extensively negotiated with Babson so that it was just large enough to accommodate the anticipated electrical equipment (Exh. IR-BE-1-7A Att.). However, subsequent to the Department's decision in Massachusetts Electric Company, D.T.E. 98-122 (which was issued on February 7, 2002), Olin has apparently abandoned its prior plan to place the switchgear on the 1,000 square feet of land it owns in Wellesley (Tr. 1, at 38-39; Exhs. OC-2, at 9; IR-BE-1-5 Supp.). Presently, Olin seeks instead to have joint switchgear with Babson, located on the Babson campus in Wellesley, accessed through a series of future easements to be conveyed by Babson (Exhs. OC-2, at 8; IR-BE-1-5 Supp.).

Olin also has attempted creative conveyancing by referencing possible future buildings, to be jointly owned with Babson and located on the Babson campus, as a means for claiming a presence in Wellesley. However, there are currently no specific plans for Olin's purchase of any interest in land or the construction of any jointly-owned buildings on the Babson campus (Tr. 1,

at 50-51). Similarly, there is no date planned for the construction or completion of these facilities (*id.*). In addition, the funds for such a joint program with Babson have not yet been identified or obtained (Tr. 1, at 51). Olin has also admitted that there is no information regarding how the property would be owned with Babson, or what agreements the two colleges would have regarding the funding, construction, use and maintenance of such facilities (Tr. 1, at 50-55). Accordingly, all of Olin's future plans regarding land or facilities located on the Babson campus are so speculative and indefinite that they cannot be considered as creating a presence in Wellesley. Regardless, all of the "plans" for such jointly-owned buildings place these facilities on what is currently the Babson campus (Exh. IR-BE-1-1(d) Supp. Att.). The basic issue in this case is whether Boston Edison has the right to serve Olin on its 70-acre campus in Needham; it is not whether Boston Edison has the right to serve properties on Babson land in Needham or Wellesley. Thus, these new buildings raise no franchise right issues to be determined in this case.¹³

Further, Olin's frequent references to its collaborative relationship with Babson are also an attempt to create a presence in Wellesley, albeit not a legal property interest. Repeated statements touting the connected nature of the academic and physical aspects of the two colleges have been made in an effort to try to establish Babson and Olin as essentially a single customer (Tr. 1, at 76; Exh. OC-2, at 2). In Massachusetts Electric Company, D.T.E. 98-122, the Department found that a single customer with straddling property could select its service provider because of the customer's legitimate presence in both service territories. Accordingly,

¹³ In any event, Boston Edison considers that any future land transfers that may occur between Olin and Babson in order for Olin to assert a right to be served by WMLP as potentially additional instances of creative conveyancing.

Olin is trying to morph the facts of this case to fall within that precedent by trying to make Olin a part of Babson, and, therefore, entitle it to receive service from WMLP.

Despite Olin's efforts, the record does not support a finding that Olin and Babson are one and the same entity. Although Babson and Olin have a Collaborative Agreement that governs aspects of the relationship between the two colleges (Exh. IR-BE-1-7C Att.), this agreement is extremely vague and does not specifically cover the issue of electricity consumption or procurement (Tr. 1, at 106-107). All evidence supports the conclusion that Babson and Olin are indeed distinct and separate institutions. For example, Olin and Babson are separate corporate entities, each with its own president and board of trustees (Tr. 1, at 19). Further, each college owns its property as separately deeded land (Exh. IR-BE-1-4 Att.). In fact, vehicular access between the two properties will be separated by locked gates to restrict traffic flow between Needham and Wellesley (Tr. 3, at 342-343). It is not uncommon for there to be inter-college agreements that allow collaboration (e.g., allowing students and faculty to have access to classes and equipment at another school), but this certainly does not make the colleges a single entity. Therefore, Olin's insistence that it is collaboratively partnering with Babson does not make Olin part of Babson, and, therefore, able to receive power from WMLP.¹⁴

¹⁴ The extent of the Olin-Babson relationship is no more persuasive than any other two separate organizations claiming a close affinity and proximity, and seeking electric service from an alternative provider through their internal mutual arrangements. It likewise would be no more compelling than, by analogy, a Dunkin' Donuts® and a Burger King®, located adjacent to each other, but across state lines in Massachusetts and New Hampshire, and by virtue of some cooperative agreement to share in the cost of purchasing supplies (e.g., straws, napkins, condiments, etc.) for the benefit of their patrons, seeking for the restaurant located in Massachusetts to avoid paying state income taxes to Massachusetts. Such a claim would be absurd, in that the obligation for the restaurant located in Massachusetts to pay state income taxes is set forth by statute and its geographic location, and not by bilateral "cooperative" agreements between private parties.

2. Olin Has Failed to Demonstrate That It Is Not Possible for the Department to Follow Municipal Boundaries in Deciding This Case or That Olin's Receipt of Service From WMLP Would Not Thwart the Legislative Intent of G.L. c. 164, § 1B(a).

G.L. c. 164, § 1B(a) defines service territories as the "service territories actually served on July 1, 1997, and *following to the extent possible municipal boundaries*" (emphasis added). In its decision in Massachusetts Electric Company, D.T.E. 98-122, interpreting G.L. c. 164, § 1B(a), the Department stated that "[p]etitions based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer's premises into a different service territory, will labor under a considerable burden to show that allowing the petition does not thwart Legislative intent." D.T.E. 98-122, at 11. Accordingly, in conformance with G.L. c. 164, § 1B(a) and Department precedent, Olin must demonstrate: (1) that it is not possible for the Department to follow municipal boundaries in determining whether the campus is in Boston Edison's or WMLP's service territory; and (2) that Olin's potential receipt of distribution service from WMLP does not thwart Legislative intent. G.L. c. 164, § 1B(a); Mass. Elec., D.T.E. 98-122, at 11.

As stated previously, Olin is located exclusively in Needham and it has no real Wellesley presence. Boston Edison has provided Olin with five preliminary and conceptual options for service (Exh. BE-ARJ-2) and has the potential to provide many more options (Tr. 4, at 511-512, 609-610; Tr. 5, at 814-515), demonstrating that Olin can indeed receive distribution service from Boston Edison under a variety of different circumstances. Unlike Stop & Shop in Massachusetts Electric Company, D.T.E. 98-122, or even Babson, there are no facts in this case that support a finding that Olin is a straddling customer. Not only is it undeniably *possible* for the Department to follow municipal boundaries in determining this franchise dispute, it also appropriate based on Olin's exclusive Needham presence. Accordingly, Olin's Petition must fail.

With regard to legislative intent, the Department's decision in Massachusetts Electric Company, D.T.E. 98-122 extensively discusses its interpretation of the Legislature's intent surrounding the passage of G.L. c. 164, § 1B(a). Specifically, the Department stated that "the very passage of St. 1997, c. 164, § 193, evidences awareness of this potential for dispute [regarding franchise boundaries] and the consequent need to regularize boundaries statewide." Id. at 7. With regard to the Department's role in interpreting the Legislature's language, the Department noted:

The legislative mandate to the Department was, as a result of this awareness, couched in terms that accorded the agency a measure of discretion in resolving disputes where the boundaries between service territories implicated municipal boundaries. The statute clearly envisions circumstances where cleanly following municipal boundaries may not be possible without giving rise to anomalies [T]he statute recognizes and provides for the administrative resolution of complex factual disputes that statutory law cannot resolve in advance and in detail. Hence, it follows that the Department has discretion to depart from municipal boundaries in resolving service territory disputes, *if* facts and fairness so warrant.

Id. at 7 (emphasis in original). Thus, the Department has determined that the Legislature's intent in passing G.L. c. 164, § 1B(a) was to regularize franchise boundaries by following municipal boundaries. The Legislature also afforded the Department latitude to determine franchise boundaries in instances where irregularities exist.

Olin has not made, and indeed cannot make, the argument that its request would not thwart the Legislative intent to regularize franchise boundaries, because it was Olin's precise intent in filing its Petition to alter what is a clear franchise boundary in this case, therefore creating a dispute where none exists, and thereby frustrating the Legislature's intent to regularize service territory boundaries. Olin's campus is, for all practical purposes, located entirely in Needham and Olin's receipt of service from Boston Edison would squarely comport with the language of the statute as well as the Legislature's intent in passing G.L. c. 164, § 1B(a). Any

argument to the contrary misconstrues the intent and application of the Restructuring Act to the distribution of electricity.

All of Olin's attempts at "creative conveyancing," as discussed above, serve to demonstrate why Olin cannot meet the requirement to show that its Petition does not thwart the intent of the statute, which was to decrease disputes regarding service territory. First, Olin sought to take service from its 1,000 square feet in WMLP's service territory in Wellesley to prevent taking service from Boston Edison in Needham. After the Department's decision in Massachusetts Electric Company, D.T.E. 98-122 made clear that receiving service based on such a land acquisition would not be permitted, Olin abandoned its argument. Olin instead began insisting that WMLP previously served the area where Olin's buildings will be located because Babson had previously had some light poles at that location, which were removed prior to Olin taking ownership. Also, Olin has tried to support its relationship with Babson as showing that the two colleges should be considered a single customer for purposes of electric distribution; however, the facts do not buttress that conclusion.

Thus, based on the record in this case: (1) it is possible and, in fact, appropriate for the Department to follow municipal boundaries in deciding this dispute; and (2) Olin's attempts to circumvent municipal boundaries by obtaining electricity in Wellesley thwart the legislative intent of G.L. c. 164, § 1B(a). Accordingly, Olin has not met its burden and its Petition should be denied.

F. The Provision of Temporary Service to Olin Is Illegal.

WMLP's current provision of electric supply to Olin through Babson-owned facilities, and Olin's present receipt of such distribution service from Babson, constitute ongoing violations of G.L. c. 164, § 47A(b). G.L. c. 164, § 47A makes no distinction between temporary and permanent service. In fact, nowhere in Chapter 164 does the Legislature differentiate temporary

and permanent service. Thus, there is no legal basis for distinguishing between the need for the Department's prior approval to initiate: (i) permanent service and (ii) temporary service. See G.L. c. 164, § 47A(b). In fact, Massachusetts case law militates against reading into a statute more specific intent on the part of the Legislature than is apparent by the plain language of the law. See Commonwealth v. Hyde, 434 Mass. 594, 612 (2001); Commonwealth v. Gordon, 422 Mass. 816, 832-833 (1996); Commissioner of Pub. Works v. Cities Serv. Oil Co., 308 Mass. 349, 360 (1941).

It is clear from the record in this case that Olin is receiving its electric supply and distribution service, classified by WMLP and Olin as "temporary service," from WMLP over lines and equipment owned and operated by Babson¹⁵ (see, e.g., Tr. 1, at 63). It is also undisputed that neither Olin nor WMLP received consent from Boston Edison or a prior order of the Department, as required by G.L. c. 164, § 47A(b), before the provision of temporary service to Olin began in 2000 (Tr. 4, at 614).

To the extent that Olin has filed its Petition explicitly seeking approval pursuant to G.L. c. 164, § 47A(d) to receive service from WMLP, Olin has thereby acknowledged the Department's authority in this matter and the need for a prior approval from the Department. Similarly, to the extent that WMLP has consistently stated a refusal to supply Olin with service

¹⁵ This places Babson in the position of being a "distribution company", defined as "a company engaging in the distribution of electricity or owning operating, or controlling distribution facilities." G.L. c. 164, § 1. The statutory definition of "distribution" is "the delivery of electricity over lines which shall operate at a voltage level typically equal to or greater than 110 volts and less than 69,000 volts to an end-use customer within the [C]ommonwealth." Id. Importantly, "[t]he distribution of electricity shall be subject to the jurisdiction of the [D]epartment." Id. Babson currently uses a 13.8 kilovolt distribution system to deliver electricity to Olin, and this rating certainly falls within the statutory definition of "distribution" (Exh. IR-BE-1-5A Att.). Also, insofar as Babson is engaging in the sale of electricity to Olin, it would also be an "electric company" pursuant to G.L. c. 164, §§ 1, 2. Thus, Babson's activities in this case subject it to the authority of the Department and this was the basis for Boston Edison's Motion to Join Babson as a party to this proceeding.

on a permanent basis without prior Department approval, it demonstrates WMLP's knowledge and understanding of the consequences of non-compliance with G.L. c. 164, § 47A(d). Accordingly, both Olin and WMLP were cognizant of the legal requirements, knowingly proceeded without appropriate consent or approval, and are currently in violation of Chapter 164. The record reflects a long and deliberate consideration by Olin, WMLP and Babson of temporary service alternatives and the Department's authority in this area (Exh. IR-BE-1-7A Att.). Notwithstanding that recognition, no requests for approval of the temporary service were sought or obtained. The Department should not countenance such a blatant end-run around its jurisdiction and applicable statutory requirements. On this basis, Olin's Petition seeking a declaratory ruling that it is within WMLP's service territory should be denied as a post-hoc attempt to legalize what it has already done.

As an additional matter, it bears noting that the "temporary" service that WMLP is providing to Olin through Babson facilities is virtually of a permanent nature (Exh. IR-BE-1-7A Att.; Tr. 1, at 103-104). First, this service has been provided to Olin since 2000 and, according to Olin's responses to information requests, is sufficient to provide service to the Olin campus until at least the end of the 2002-2003 academic year, which is May or June of 2003 (Exh. IR-BE-3-17). Thus, the temporary service has been and is sufficient to provide service to Olin for between three and four years (*id.*). Moreover, the temporary service has the capacity to handle Olin's growing load up to approximately 2.39 MW (RR-BE-1). Thus, the capabilities of Olin's temporary service are essentially permanent in nature. Therefore, Boston Edison requests that the Department address the legality of the temporary service in its final decision:

G. Olin's and WMLP's Allegations Regarding Reliability and Cost Are Not Relevant to the Determination of Exclusive Service Territory Boundaries

Primary elements of the cases presented by both Olin and WMLP, and a significant focus of discovery and testimony during the hearings concerned issues of cost and reliability. Despite the undoubted importance of such issues to customers, distribution companies and the Department,¹⁶ such issues are not determinative of service territory boundaries and do not entitle a customer in one service territory to opt out and elect to receive service from a provider in a neighboring service territory. Presumably, such issues would be relevant in the case of a customer with a bona fide straddling presence in two different service territories and who could therefore choose the provider from which it would receive service.¹⁷ They are not considerations that are relevant, however, either by statute or by precedent, to the determination of exclusive service territory boundaries.

As stated previously, G.L. c. 164, § 1B(a) defines the service territories of electric distribution companies as “the service territories actually served on July 1, 1997, and *following to the extent possible municipal boundaries*” (emphasis added). Nowhere in the relevant statute is the Department authorized to consider cost and reliability in reaching its decision in a service territory dispute, nor do the terms cost and reliability appear anywhere in G.L. c. 164, § 1B(a).

¹⁶ Clearly, the Department has extensive authority to address issues of cost and service reliability, and the Department has regularly done so in the course of its ratemaking jurisdiction pursuant to G.L. c. 164, § 94, investigations of the price or quality of service pursuant to G.L. c. 164, § 93, establishment of service quality standards pursuant to G.L. c. 164, § 1E, and approval of service quality plans and imposition of penalties thereunder pursuant to Service Quality Standards for Gas and Electric Distribution Companies, D.T.E. 99-84 (2001).

¹⁷ Such relevance would not occur in a legal sense, but rather in the sense that these would be considerations that a customer in such a situation would be likely to consider. The essence of being a straddling customer, and by virtue of its geographical circumstances having a right to choose, is that the customer could choose for any reason it felt important, or no reason at all. Certainly, it would not require a proceeding before the Department in order to determine which provider had the lower rates or the more reliable service interconnection.

Despite this, Olin and WMLP have repeatedly attempted to make reliability, disparate rates and interconnection costs issues in this proceeding. Olin and WMLP allege that the Department should consider the savings that Olin would accrue, in terms of lower interconnection costs and annual electricity rates, in receiving service from WMLP. Additionally, Olin seemingly contends that it is somehow a special customer whose “heightened” reliability needs can be met only by dedicated underground circuits, one of which fortuitously exists nearby in the neighboring WMLP service territory, but which are not a general feature of Boston Edison’s existing system to customers in this area of Needham. Ignoring for the moment any question regarding the sincerity of Olin’s views in this respect regarding the requirement for underground service,¹⁸ for Boston Edison such matters are governed by its terms and conditions of service and by applicable statutes respecting the provision of underground service (Exh. IR-OC-1-7 Att. (M.D.T.E. No. 948, Appendix B, regarding payment by a customer of line extension costs, including cost of underground construction, less applicable revenue credits)). See G.L. c. 166, §§ 22A-22N (regarding a municipal requirement to place lines underground). What this means in essence is that, if Olin wishes some special construction to serve it, then Olin must pay the incremental cost over that which is system development, subject to any revenue credit.

Olin’s and WMLP’s contention that these are proper issues to consider in determining which utility is authorized to serve Olin is located is baseless and without merit. First, with regard to the rates charged, Boston Edison’s approved rates have been subjected to exhaustive review by the Department and found to be just and reasonable. Simply because one distribution

¹⁸ Boston Edison, like many other distribution companies and WMLP itself, serves a variety of customers throughout its service territory including hospitals, educational institutions and businesses in a fully reliable manner utilizing overhead service (Tr. 3, at 424; Tr. 4, at 584). Mr. Hannabury admitted that he had made no attempt to check with other such customers to evaluate the necessity of underground service (Tr. 2, at 154-155).

company has lower rates than another distribution company at a certain point in time does not warrant allowing customers to select between the two distribution companies. If this were the case, new customers from all regions of the state would simply always select the distribution company with the lowest rates and, accordingly, the boundaries between service territories would be unpredictable and no longer determined by municipal boundaries. This is exactly the kind of confusion that the Legislature was seeking to prevent when it prescribed defined service territories in G.L. c. 164, § 1B(a).

Similarly, the cost to interconnect is, by itself, not a valid basis, particularly where the cost is driven by the customer's own choice for a particular manner of supply.¹⁹ Clearly, this is not a case, as with the Cartwright Road area, where supply by one distribution company is either impossible, or faced with disproportionately costly obstacles. Boston Edison already provides service to Olin on the parcel in question, has service on all of the streets surrounding the parcel, and has presented options for expanded service to the new Olin facilities at costs, after a revenue credit, beginning at essentially zero dollars (see Exh. BE-ARJ-2 (based upon an assumed service requirement of 4 MW and an applicable revenue credit of \$640,000 as calculated in Exh. IR-OC-1-7 Att.)). It should be noted that, since receiving additional information from Olin during hearings, particularly regarding Olin's initial load requirements, Boston Edison has been able to develop still additional design options for Olin that would be at little to no cost to Olin and could

¹⁹ As Boston Edison witnesses noted on several occasions, the level of information and cooperation provided by Olin throughout the process during which potential service options were being developed and discussed was less than exemplary, if the objective was indeed to design the most cost-effective interconnection. In this case, Olin: (1) has insisted on completely redundant, dedicated and underground service (Tr. 6, at 870; Exh. BE-ARJ-2) (2) has refused to give Boston Edison the information it needed to provide detailed design options (Tr. 5, at 786); and (3) did not consider an interconnection with the Boston Edison system in designing its on-campus facilities (Exh. BE-JJN-1, at 10-12). All of these factors would tend to increase the interconnection costs for Olin to be served by Boston Edison.

provide comparable reliability to the service Olin anticipates receiving from WMLP (see Tr. 4, at 511-512, 609-610; Tr. 5, at 814-815).²⁰

Lastly, with regard to reliability, Olin's and WMLP's position that a distribution company's reliability should be considered in determining its service territory is also without foundation. The Department meticulously regulates and investigates issues of service quality and reliability, penalizing companies for failure to meet the Department's rigorous standards. The Department recently completed a generic investigation of such issues in D.T.E. 99-84, completed more specific investigations of the NSTAR Electric companies in D.T.E. 01-65 and D.T.E. 01-71A. Those are the proper proceedings in which to address service quality concerns, not to mention the readily available avenue of the Department's Consumer Division for specific issues that cannot be directly resolved with the Company (Tr. 4, at 620).²¹ There is no basis to use such issues to determine service territory boundaries for individual customers.

Accordingly, Boston Edison has demonstrated that it is ready, willing and able to provide high-quality, reliable service to Olin at a reasonable cost, in accordance with its Department-approved rates, terms and conditions (Exhs. BE-ARJ-1, at 8; BE-JJN-1, at 22). The fact that

²⁰ As stated previously, Olin's and WMLP's decision to decline cross-examination of Mr. Jessa on this particular point undercuts their argument that interconnection costs and reliability should be considered in service territory disputes.

²¹ One such issue that received extensive discussion during the hearings concerned asserted issues of flickering lights and voltage fluctuations at certain of Olin's existing buildings (former residential properties converted to office use) served by Boston Edison along Great Plain Avenue (see, e.g., Tr. 3, at 344-347). These properties would continue to be served by Boston Edison in all scenarios that were discussed, and the service to the new Olin campus buildings would essentially be entirely new construction. The record shows that there were service reliability issues to these buildings during 2000; however, Boston Edison corrected these problems in the fall of 2000 (Exh. IR-OC-1-6 Att.) and in a meeting in June 2001 Olin representatives acknowledged that the problem was much better, and they were told to call Boston Edison if the problems later recurred (Exh. IR-OC-1-6 Att.). Mr. Hannabury now asserts that the problems persist (see, e.g., Tr. 3, at 344-347), which was news to Boston Edison (Tr. 6, at 880). Boston Edison is more than willing to continue to work with Olin, and its licensed electrical contractor, to get to the bottom of the issue at these particular buildings (and if the Company doesn't respond, and the problem lies with the

(footnote continued...)

some other distribution provider may possibly be argued to have a lower rate, or a lower cost to interconnect to provide a specific type of service interconnection or a specific level of reliability, is not germane to the establishment of service territory boundaries.

VII. CONCLUSION

For all of the foregoing reasons, Boston Edison has demonstrated that it has an exclusive franchise right to serve electricity customers in Needham, pursuant to G.L. c. 164, § 1B(a), and that Olin is located exclusively in Needham. The arguments presented by Olin and WMLP relative to Olin's relationship with Babson, certain prior service arrangements along the Needham-Wellesley border, and cost and reliability are predicated on misstatements and misunderstandings of the pertinent facts and the applicable law. Accordingly, Boston Edison respectfully submits that the Department should deny Olin the relief requested in its Petition and determine that Olin is an electricity customer properly served by the Company.

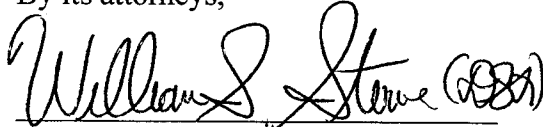
(...footnote continued)

Company's service, then Olin should by all means complain and call the Department's Consumer Division); however, the short answer is that the solution is electrical and not legal.

Respectfully Submitted,

**BOSTON EDISON COMPANY, d/b/a NSTAR
ELECTRIC**

By its attorneys,

A handwritten signature in black ink, appearing to read "William S. Stowe", with a circled "2002" at the end.

William S. Stowe, Esq.

Assistant General Counsel

NSTAR Electric & Gas Corporation

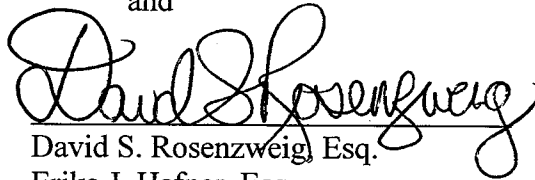
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and

A handwritten signature in black ink, appearing to read "David S. Rosenzweig".

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Dated: May 6, 2002

NSTAR\Olin College\Briefs\Initial Brief\Initial Brief.doc

APPENDIX A

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of Franklin W. Olin College of Engineering

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D.T.E. 01-95

**BOSTON EDISON COMPANY'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I. PROPOSED FINDINGS OF FACT

1. Franklin W. Olin College of Engineering ("Olin"), the petitioner in this case, is a small engineering college founded in 1997 and located in the Town of Needham ("Needham"), Massachusetts (Tr. 1, at 18).
2. Olin owns a 70-acre parcel of land along Great Plain Avenue in Needham upon which its current buildings are located and upon which Olin is constructing several new buildings (Exhs. BE-ARJ-4; IR-BE-1-1A Att.; IR-BE-1-1B Att.).
3. Olin owns 1,000 square feet of property in the Town of Wellesley ("Wellesley") that was purchased on October 31, 2001 to support its Petition before the Department (Exh. IR-BE-1-4 Att.).
4. This 1,000 square feet in Wellesley is not a "buildable lot" and Olin currently has no plans to use this parcel in any manner (Tr. 1, at 38-39; Exhs. IR-BE-1-1B Att.; OC-2, at 9; IR-BE-1-5 Supp.).
5. All of Olin's buildings and facilities are located in Needham, and all of Olin's electricity consumption occurs in Needham (Exhs. IR-BE-1-20; IR-BE-1-21).
6. Olin receives all of its utility services from Needham providers, including water, sewer, natural gas and cable (Exhs. IR-BE-1-23, IR-BE-1-24, IR-BE-1-25, IR-BE-1-26; Tr. 1, at 47-50).

7. Olin's current load is approximately 1 megawatt ("MW") and expects its total load, upon full build out in eight to ten years, to be approximately 3.5 to 4 MW (Tr. 5, at 814-15; Tr. 4, at 609-10; Tr. 1, at 22-23).
8. The Olin campus is located directly adjacent to Babson College ("Babson"), and abuts the municipal boundary with Wellesley (Exhs. IR-BE-1-1A Att.; IR-BE-1-1B Att.; IR-BE-1-1C Att.).
9. Babson is located primarily in Wellesley, although a small portion of its contiguous campus, including a few buildings and a parking lot, straddle the Needham-Wellesley town line (Exhs. IR-BE-1-1A Att.; IR-BE-1-1B Att.; IR-BE-1-1C Att.).
10. Olin does not straddle the town boundary between Needham and Wellesley (see Exhs. IR-BE-1-1A Att.; IR-BE-1-1B Att.; BE-ARJ-4).
11. Electricity users in Wellesley receive their electric service from Wellesley Municipal Light Plant ("WMLP") and, accordingly, Babson's campus is served through a connection with WMLP in Wellesley (Exh. BE-ARJ-4).
12. Since January 2000, Olin has been receiving, and to this date continues to receive, the temporary service for its new buildings through facilities owned, operated and maintained by Babson, and from electricity supplied to Babson by WMLP through a connection in Wellesley (Exh. OC-2, at 16; Tr. 1, at 63).
13. Olin seeks to receive its permanent distribution service through a direct connection with WMLP on the Babson campus in Wellesley (Tr. 1, at 38).
14. On July 1, 1997, and for almost a century prior to that date, Boston Edison Company, d/b/a NSTAR Electric ("Boston Edison" or the "Company"), provided electric distribution service in Needham (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 15-16).

15. Boston Edison has served Needham in general for approximately a century (Exhs. IR-OC-1-21 Supp. Att.; BE-JJN-1, at 15-16) and currently serves the area of Needham immediately adjacent to and surrounding the Olin campus (Exhs. IR-OC-1-19(A) Supp. Att.; IR-OC-1-19(B) Supp. Att.).
16. Boston Edison has provided electric service to at least five pre-existing buildings on the Olin campus in Needham for several decades, and continues to serve these buildings currently (Exh. OC-2, at 5).
17. Boston Edison has not consented to service to Olin by WMLP, and it is ready, willing and able to provide distribution service to meet Olin's current and future needs, in accordance with the Company's rates, terms and conditions filed with the Department, from facilities located along Great Plain Avenue and/or Forest Street in Needham (Exh. BE-ARJ-2; Tr. 4, at 511-12, 609-10; Tr. 5, at 814-15).
18. There are no facts in this proceeding that warrant the Department's deviation from municipal boundaries in determining which distribution company has the franchise right to serve Olin.

II. PROPOSED CONCLUSIONS OF LAW

1. By St. 1997, c. 164, § 193, inserting G.L. c. 164, § 1B(a), the General Court directed the Department to "define service territories for each [electric] distribution company ..., based on the service territories actually served on July 1, 1997, and *following to the extent possible municipal boundaries* [emphasis added]."
2. The Department's analysis in defining service territories focuses on the customer, and not the respective utilities, in reaching a fair resolution in these matters. Massachusetts Electric Company, D.T.E. 98-122, at 8 (2002) (hereinafter "Mass. Elec.").

3. The Department has discretion to depart from municipal boundaries in resolving service territory disputes, *if* facts and fairness so warrant. Mass. Elec., D.T.E. 98-122, at 7 (2002) (emphasis in original).
4. Accordingly, a petitioner seeking a ruling from the Department which departs from municipal boundaries must show that, because of factual circumstances specific to that customer, it is not possible to use municipal boundaries in determining a distribution company's service territory. See G.L. c. 164, § 1B(a).
5. Where the customer's premises are an uninterrupted parcel owned in fee or leased by the customer, where those premises straddle a municipal boundary and thus straddle the presumptive line between two electric distribution companies, and, of particular importance, where there is not evidence that the customer engaged in land conveyance or lot merger to get around or defeat the central intent of G.L. c. 164, § 1B(a), the Department has determined that the customer may have a choice of provider. Id.
6. The Legislature did not intend G.L. c. 164, § 1B(a) to be an invitation to engage in "creative conveyancing." See Mass. Elec., D.T.E. 98-122, at 11.
7. Olin's purchase of 1,000 square feet in Wellesley on October 31, 2001, constitutes creative conveyancing because it was intended solely to give Olin a presence in Wellesley to support its Petition in this case. See Mass. Elec., D.T.E. 98-122, at 11.
8. Olin's speculative references to future buildings it may jointly own with Babson or future interests in land it may acquire are also a form of creative conveyancing designed to manufacture a presence in Wellesley to support its Petition. See Mass. Elec., D.T.E. 98-122, at 11.

9. Olin's references to its cooperative relationship with Babson do not establish that Olin and Babson are the same electricity customer from a legal and regulatory perspective, which, if true, would thereby make Olin a customer that legitimately straddles the municipal boundary. See Mass. Elec., D.T.E. 98-122, at 11.
10. Prior service to the light poles that were formerly on Lot 2 does not establish this area of Needham as a location "actually served on July 1, 1997" for purposes of defining Wellesley Municipal Light Plant's ("WMLP") service territory because: (1) the type and amount of such service was different in kind and in quantity in comparison to the proposed new service to Olin; (2) the facilities to provide such service have been removed, no longer exist and such service has been discontinued; (3) service to these poles was not provided by WMLP in Needham, but was exclusively through Babson distribution facilities at a point of connection in Wellesley; (4) at the time these light poles existed, the property was owned by Babson, a legitimate straddling customer entitled to distribute electricity throughout its own property; and (5) the proposed service has been expanded in degree and scope to the point that the current service differs so substantially from the prior service as to make it not comparable to any pre-existing service. See Mass. Elec., D.T.E. 98-122, at 9, 11.
11. The Department has stated that "[p]etitions based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer's premises into a different service territory" would be subject to the burden of having to show that the petition does not "*thwart Legislative intent.*" Mass. Elec., D.T.E. 98-122, at 11 (emphasis added).

12. In ascertaining the Legislature's intent in passing G.L. c. 164, § 1B(a), Department stated that "the very passage of St. 1997, c. 164, § 193, evidences awareness of th[e] potential for dispute [regarding franchise boundaries] and the consequent need to regularize boundaries statewide." Mass. Elec., D.T.E. 98-122, at 7. Thus, the Department has determined that the Legislature's intent in passing G.L. c. 164, § 1B(a) was to regularize franchise boundaries by following municipal boundaries. See id.
13. Olin's Petition in this case indeed thwarts the Legislative intent to decrease franchise boundary disputes by following municipal boundaries in defining service territories because Olin is a customer located in Needham, which is part of Boston Edison's exclusive service territory, and Boston Edison is ready, willing and able to serve Olin. See Mass. Elec., D.T.E. 98-122, at 11.
14. Accordingly, as a customer located in Needham, Olin should receive its electric distribution service from Boston Edison. G.L. c. 164, § 1B(a).
15. Olin's alternative request for relief, pursuant to G.L. c. 164, § 47A(d), is not applicable. Section 47A(d), authorizes the Department to grant relief using the same standards set forth in G.L. c. 164, §§ 47, 60. Under G.L. c. 164, § 47, the Department may permit a municipal light plant to extend its lines into an adjoining town "if such town of a private corporation therein is not then supplying such town with gas or electricity, as the case may be." Similarly, under G.L. c. 164, § 60, the Department may compel service by a municipal light plant to a customer if that municipal light plant has refused to provide service to such customer. Because Boston Edison supplies electric service in Needham and WMLP has not refused to provide service to Olin, neither G.L. c. 164, §§ 47 nor 60 forms a basis for relief under G.L. c. 164, § 47A(d).